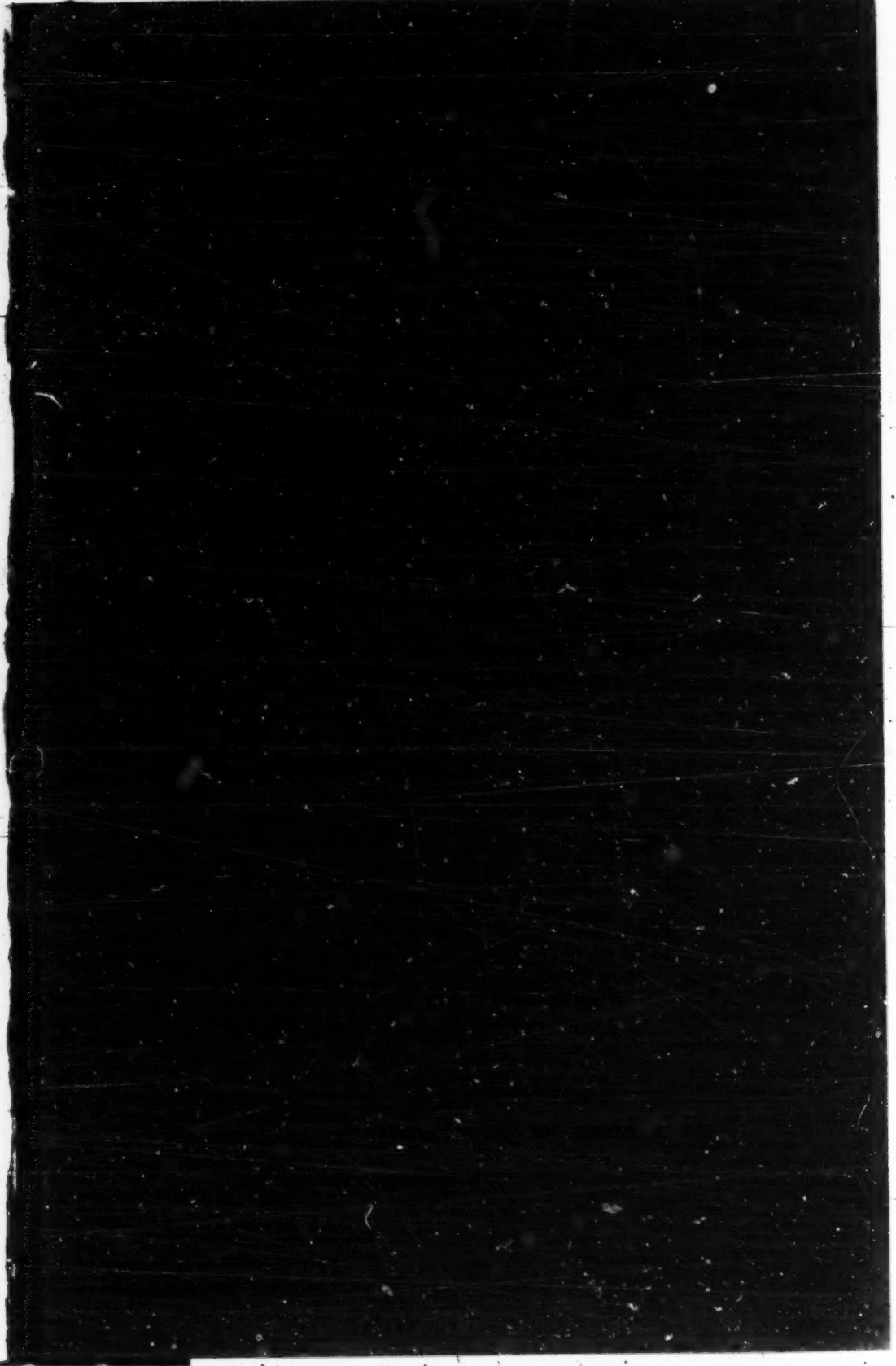

INDEX.

APPENDIX TO APPELLANT'S BRIEF.

Appendix A.

Docket Entries.

(1)*

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Civil 2103.

UNITED STATES OF AMERICA for the use and benefit of CALVIN TOMPKINS COMPANY,

AGAINST

CLIFFORD F. MACEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY.

1942

Apr. 4 Complaint filed.

4 Summons issued.

14 Summons returned, served on Clifford F. MacEvoy Co. by serving Vice President on April 8th and on Commissioner of Banking and Insurance on April 6th, filed.

25 Notice of motion for order dismissing action and affidavit filed.

25 Affidavit of service filed.

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* Parenthetical references are to page numbers of the transcript of record.

Docket Entries.

May	4	Order adjourning motion filed (May 11).
	11	Stipulation adjourning motion filed (May 18).
	18	Hearing on motion for order dismissing action. Decision reserved. Briefs to be submitted (Fake).
1943		
Mar.	17	Memorandum filed (Case to be dismissed with costs) (Fake).
Apr.	5	Order of dismissal with costs to defendant filed.
	5	Judgment for costs in favor of defendants, entered (Notice sent attorneys).
	13	Defendant's costs taxed at $20.00 filed.
	22	Notice of Appeal filed.
	22	Bond on Appeal filed.
	22	Designation of Record on Appeal filed.

Complaint.

(2)

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA for the use and benefit of THE CALVIN TOMKINS COMPANY,

Plaintiff,

AGAINST

CLIFFORD F. MACEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

United States of America for the use and benefit of The Calvin Tomkins Company for its complaint alleges:

1. The Calvin Tomkins Company is a corporation organized and existing under the laws of the State of New York.

2. Defendant Clifford F. MacEvoy Company is a corporation organized and existing under the laws of the State of New Jersey.

3. Defendant The Aetna Casualty and Surety Company is a corporation organized and existing under the laws of the State of Connecticut.

4. On or about the third day of June, 1941 the United States of America represented by the Federal Works Administrator and defendant Clifford F. MacEvoy Company duly entered into a written contract dated as of the said day, wherein and whereby defendant Clifford F. MacEvoy Company for a valuable consideration, agreed to furnish the materials and perform the work necessary for the construction of seven hundred dwelling-units on the site of the Government's Defense Housing Project

NJ-28071 located in the Township of Clark and in the City of Linden, Union County, New Jersey, on a cost plus a fixed fee basis; for a further description of the said

(3)

contract reference is hereby made to the said contract now on file in the General Accounting Office of the United States of America, which said contract is incorporated herein by reference thereto.

5. Pursuant to the act of Congress approved August 24, 1935, 49 Stat. 793, 794, 40 USCA 270a, 270b, defendant Clifford F. MacEvoy Company, as principal, and defendant The Aetna Casualty and Surety Company, as surety, on or about the 22nd day of May, 1941 duly executed a bond to the United States of America wherein and whereby defendant Clifford F. MacEvoy Company, as principal, and defendant The Aetna Casualty and Surety Company, as surety, bound themselves, jointly and severally, in the amount of one million dollars, the condition of the said bond being that defendant Clifford F. MacEvoy Company, as principal, shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in the aforesaid contract and any and all duly authorized modifications of said contract; for a further description of the said bond reference is hereby made to the said bond now on file in the General Accounting Office of the United States of America, which said bond is incorporated herein by reference thereto.

6. The said bond was duly accepted by the United States of America and upon such acceptance the aforesaid contract for the construction of the said seven hundred dwelling-units was awarded to defendant Clifford F. MacEvoy Company.

7. By reason of the foregoing defendant Clifford F. MacEvoy, as principal, and defendant The Aetna Casualty

and Surety Company, as surety, had imposed upon them, jointly and severally, the liability, among other things, of seeing that prompt payment was made by defendant Clifford F. MacEvoy Company to corporations furnishing materials in the prosecution of the work provided for in

(4)

the aforesaid contract.

8. Defendant Clifford F. MacEvoy thereafter contracted with James H. Miller & Company for the furnishing of building materials by James H. Miller & Company for the prosecution of the work provided for in the aforesaid contract between the United States of America and defendant Clifford F. MacEvoy Company.

9. Between on or about the 30th day of June, 1941 and on or about the 12th day of November, 1941, The Calvin Tomkins Company at the special instance and request of James H. Miller & Company duly furnished and supplied to James H. Miller & Company building materials at the agreed price and of the reasonable value of $47,119.14 payable on the 10th day after the half-month during which it was delivered, all of which was due on or before the 25th day of November, 1941; no part of said sum has been paid, except the sum of $35,085.65, and the amount due and owing by James H. Miller & Company to The Calvin Tomkins Company for the said materials is the sum of $12,033.49 with interest from the respective due dates.

10. The materials furnished and supplied by The Calvin Tomkins Company to James H. Miller & Company as aforesaid were furnished in the prosecution of the said work provided for in the aforesaid contract between United States of America and defendant Clifford F. MacEvoy Company.

11. The materials furnished and supplied by The Calvin Tomkins Company to James H. Miller & Company as aforesaid were furnished in the prosecution of the aforesaid work with the knowledge, consent and approval of defendant Clifford F. MacEvoy.

12. Within ninety days from the date on which The Calvin Tomkins Company furnished the last of the aforementioned material to James H. Miller & Company and on the 6th day of January, 1942, The Calvin Tom-

kins Company duly gave written notice to defendant Clifford F. MacEvoy Company and defendant The Aetna Casualty and Surety Company of the amount of its claim for unpaid materials furnished by it as aforesaid, which said notice stated that the materials had been furnished to James H. Miller & Company.

13. The aforesaid contract between the United States of America and defendant Clifford F. MacEvoy Company was to be performed and executed in the district of New Jersey.

14. One year has not elapsed from the date of final settlement of the aforesaid contract between the United States of America and defendant Clifford F. MacEvoy Company.

WHEREFORE, the United States of America for the use and benefit of The Calvin Tomkins Company demands judgment against defendants in the sum of $12,033.49 with interest and costs.

BENJAMIN P. DEWITT,
Attorney for Plaintiff,
423 Center Street,
South Orange,
New Jersey.

Defendants' Motion to Dismiss Complaint.

(6)

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW JERSEY.

Civil Action File No. 2103.

UNITED STATES OF AMERICA for the use and benefit of THE CALVIN TOMKINS COMPANY,

Plaintiff,

AGAINST

CLIFFORD F. MACEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

Sir:

PLEASE TAKE NOTICE, that upon the summons and complaint herein, the undersigned will move this Court at the Federal Building, Federal Square, in the City of Newark, New Jersey, on the 4th day of May, 1942, at ten-thirty o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the above action on the ground that the plaintiff fails to state a claim against the defendants upon which relief can be granted, and for such other and further relief as to the Court may seem just in the premises.

ELMER Q. GOODWIN,
507 Orange Street,
Newark, New Jersey,
Attorney for Defendants,
Clifford F. MacEvoy Company
and
The Aetna Casualty and Surety
Company.

To:

BENJAMIN P. DEWITT, ESQ.,
Attorney for Plaintiff,
423 Center Street,
South Orange, New Jersey.

Memorandum.

(9)

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW JERSEY.

Civil Action #2103.

UNITED STATES OF AMERICA for the use and benefit of THE CALVIN TOMKINS COMPANY,

Plaintiff,

AGAINST

CLIFFORD F. MACEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

APPEARANCES:

BENJAMIN P. DEWITT, ESQ., Attorney for Plaintiff.

ELMER O. GOODWIN, ESQ., Attorney for Defendants.

FAKE, *District Judge*:

The issues here arise on motion to dismiss the complaint on the ground that it fails to state a valid cause of action.

It appears upon the face of the complaint herein that the MacEvoy Company entered into a contract with the Federal Works Administrator under the terms of which the MacEvoy Company was to furnish materials for and construct seven hundred dwelling units known as the Government's Housing Project N. J. 28071. Thereafter the MacEvoy Company as principal and Aetna Casualty

and Surety Company as surety entered into a bond in the amount of a million dollars conditioned to "promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in the aforesaid contract" pursuant to Statute 40 U. S. C. A. 270a, 270b.

(10)

Thereafter the MacEvoy Company contracted with the Miller Company for the furnishing of building material by the Miller Company for the prosecution of the work covered by the aforesaid contract, and further thereafter the Tomkins Company, plaintiff herein "at the special instance and request of the Miller Company duly furnished and supplied to the Miller Company building materials at the agreed price and of the reasonable value of $47,119.14" on which a balance of $12,033.49 remains unpaid. These materials were delivered on the job by the plaintiff and used in the performance of the contract between the Federal Works Administrator and the MacEvoy Company and as alleged: "with the knowledge and consent of the MacEvoy Company". The Statute involved reads as follows:

> (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the

sum or sums justly due him: PROVIDED, HOWEVER, *That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond* upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States Marshal of the district in which the public improvement is situated is authorized by law to serve summons." 270b. Title 40 U. S. C. A. (italics supplied).

A question arises as to whether on the face of the

complaint the plaintiff is shown to have any direct contractual relationship with a subcontractor. This leads to a further question. Was the materialman Miller a subcontractor within the meaning and intent of the statute? It is noted that the Heard Act, 40 U. S. C. A. 270, which preceded the Miller Act above quoted, contained no proviso such as that italicized above. The construction therefore placed on the Heard Act by the courts in the cases next below cited must be read in the light of the absence

of the proviso and when so considered they afford little if any assistance in answering the questions above propounded. See *U. S. Use of Hill* v. *American Surety Company of N. Y.*, 200 U. S. 197, 50 L. Ed. 437; *Continental Casualty Co.* v. *North American Cement Corporation*, 91 Fed. 2nd 307; and *Utah Const. Co., et al.* v. *U. S.*, 15 Fed. 2nd 21.

The proviso in the Miller Act lies at the base of the plaintiff's right of recovery in the instant case. If it appears that the materialman Miller, to whom plaintiff furnished materials, comes within the meaning and intent of the word, subcontractor, then plaintiff has a contract with a subcontractor since it appears that he furnished materials to Miller under an agreement so to do.

Bearing in mind that the word, subcontractor, appears here in a statute intended to function in the sphere of building construction in which sphere the mechanic's lien laws of the several states have long been operative and it further appearing that there are no Federal cases construing the word as used in the Miller Act, it is well to look to the meaning of the word as generally understood in the building trade and adopted by the state courts. Of course in its broader and more comprehensive sense it would seem to include anyone who furnishes either labor or material on the job when a contract express or implied can be spelled out. But as we shall see, such an all-inclusive interpretation cannot be accepted in the light of its usage in the trade or in its

interpretation by many of the state courts. However an examination of the cases cited in Words & Phrases under, subcontractor, and those appearing in the same work under, materialman, leave the searcher after truth in a state of unhappy confusion. For example, in *Beckhard* v. *Rudolph, et al.*, 68 N. J. Eq. 315, 59 Atl. 253,

the late Vice Chancellor Stevenson considering the New Jersey Mechanic's Lien law said; "A lien is given to a materialman—to a man who has furnished materials * * *. If his charge is for materials alone, then he is a materialman. If his charge is for work and labor in putting the materials in the building, then he is a contractor for the erection of the building. He is not a materialman. He never is described as such * * *. If a man makes a contract to supply material, and by his labor incorporate that material into the building, he is not a materialman, in my judgment;". This case went up on appeal to the Court of Errors and Appeals, 68 N. J. Eq. 740, 63 Atl. 705, and Mr. Justice Pitney then of that court said in the opinion reversing the Vice Chancellor: "The learned Vice Chancellor rejected the suggestion that the words 'any person who may have furnished materials used in the erection of any such house or other building', might be deemed to cover the case of a plumber who furnishes fixtures set up and installed in the building, including as well the cost of the work of installation as the cost of the fixtures themselves; deeming that the force of the word 'materialman' as used in the latter part of the section prevented the adoption of such a construction, and that this term as used in the section practically means one who has furnished materials only; * * *. In our opinion this is too narrow a reading of the letter of the section, and fails to give due effect to the spirit of the act * * *". Thus it appears that the court of last resort in New Jersey has ruled under the peculiar provisions of the

New Jersey Act that the word "materialman" includes one who contracted to furnish and install material. A year later the same rule was followed in *McNab & Harlin Mfg. Co.* v. *Paterson Bldg. Co.*, 72 N. J. Eq. 929, 67

Atl. 103. To this limited extent then and to such extent only do we find the word, contractor, and the word, materialman, combined and interwoven as one by judicial interpretation. It should be emphasized that these New Jersey decisions are influenced largely by the letter and spirit of the New Jersey Act. They are considered here primarily to point out the elusive problem presented by the instant case.

In *Northwest Roads Co., et al.* v. *Clyde Equipment Co.*, 79 Fed. 2nd 771, the Circuit Court of Appeals of the Ninth Circuit considered a state statute which provided for a payment bond to cover "any person or persons performing such services or furnishing material to any subcontractor" and in the course of the opinion said: "as we view it, the only materialman who can successfully maintain an action under the statute is one who furnishes supplies or materials to a contractor or a subcontractor. *Neary* v. *Puget Sound Engineering Co.*, 114 Wash. 1, 194 P. 830, is conclusive to the effect that a claim for services rendered to a mere materialman is beyond the protection of the statute. By the only reasoning available to us because of that holding, we must also say that a claim for materials furnished to a mere materialman is likewise without the provisions of the statute." The foregoing is, I think, the more reasonable view to take in the instant case. I am not unmindful however of the many citations which appear in the published compendiums bearing upon the words, contractor, subcontractor and materialman. These cases for the most part, draw their inspiration from state statutes which are not fully comparable with the statute involved here and I have chosen the case last above cited

because, while a state statute is involved there, it is more closely akin to our immediate statute than any I have

found. Moreover I fully agree with the late Vice Chancellor Stevenson that a materialman and a contractor are not synonymous terms in the building trades. It follows that the plaintiff herein, being a mere materialman who furnished material to another materialman who in turn had a contract with the contractor, does not fall within the benefits afforded by the statute.

The fact that the plaintiff furnished the material as alleged, with the knowledge and consent of the principal contractor, does not result in spelling out an implied contract with the principal contractor since plaintiff was already under a contract with the materialman Miller to furnish them.

An order will be entered dismissing the complaint with costs to be taxed.

Order and Decree.

(15)

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Civil Action #2103.

UNITED STATES OF AMERICA for the use and benefit of THE CALVIN-TOMKINS COMPANY,

Plaintiff,

AGAINST

CLIFFORD F. MACEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

This matter being opened to the Court by Elmer O. Goodwin, Esq., Attorney for the defendants herein, on Motion to Dismiss the complaint on the ground that it fails to state a valid cause of action; and the Court having considered argument of counsel and the briefs filed herein, and being satisfied as to the sufficiency of the defendants' application, it is thereupon on motion of the said Elmer O. Goodwin, Esq., on this 5th day of April, A. D. 1943.

ORDERED, ADJUDGED AND DECREED, that the complaint filed herein be and the same is hereby dismissed with costs to be taxed.

It is so ordered,

GUY L. FAKE,
U. S. D. J.

APPENDIX TO APPELLEE'S BRIEF.

Appendix "A".

Form of Bond.

U. S. Standard Form No. 25-A
Approved by the Secretary
of the Treasury
Sept. 16, 1935

PAYMENT BOND

(Construction.)

Pursuant to the Act of Congress, Approved August 24, 1935
(49 Stat. 793; 40 U. S. Code Sec. 270a)

---

38 S 6346

KNOW ALL MEN BY THESE PRESENTS, That we, CLIFFORD F. MACEVOY COMPANY, a corporation of the State of New Jersey as Principal, and THE AETNA CASUALTY AND SURETY COMPANY, a corporation of the State of Connecticut, as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of ONE MILLION AND NO/100 ($1,000,000.00) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation is Such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated May 22, 1941, for Construction of 700 dwelling units for Defense Housing Project, N. J. 28071, Township of Clark and City of Linden, Union County, New Jersey.

Form of Bond.

Now, THEREFORE, If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the above-bounden parties have executed this instrument under their several seals this 22nd day of May, 1941, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

CLIFFORD F. MacEVOY COMPANY
(Corporate principal)
405 Seventh Avenue, Newark, N. J.
By CLIFFORD F. MacEVOY (President)

Attest:

MILDRED WAKEFIELD
(Assistant Secretary)

THE AETNA CASUALTY AND SURETY COMPANY
(Corporate surety)
1180 Raymond Boulevard, Newark, N. J.
By Resident Vice President (S. M. WILLIAMS, JR.)

Attest:

Resident Assistant Secretary
(M. LEBLANC)

Premium included in charge on
The rate of premium on this bond is.....per thousand.
Performance bond

Total amount of premium charged, $.....

Appendix "B".

Affidavit of Mildred Wakefield as to Payment for Materials.

AFFIDAVIT.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil Action File No. 2103.

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,

Plaintiff,

—against—

CLIFFORD F. MACEVOY and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

State of New Jersey,
County of Essex—ss.:

MILDRED WAKEFIELD, being duly sworn according to law on her oath, deposes and says that:

1. I am employed as an accountant for Clifford F. MacEvoy Company and was so employed during the dates mentioned in the complaint filed in the above cause.

2. I state and aver that Clifford F. MacEvoy Company made payment in full to James H. Miller Co. for all materials and supplies furnished Clifford F. MacEvoy Company in the progress of the construction of seven hundred (700) defense housing units at Winfield, New

Affidavit of Mildred Wakefield as to Payment for Materials.

Jersey. The following is a schedule of all the payments made by Clifford F. MacEvoy Company to the said James H. Miller Co.:

1941			
July	10	$	122.89
"	10		184.33
"	22		1,128.53
"	30		3,207.38
August	6		2,192.79
"	18		6,645.76
September	17		4,211.10
October	2		14,390.92
"	2		125.67
"	16		3,098.51
"	23		14,936.99
November	5		4,106.62
1942			
January	22		311.69
"	22		78.27

3. Clifford F. MacEvoy Company is not indebted to the said James H. Miller Co. in any amount.

MILDRED WAKEFIELD.

Subscribed and sworn to before me
this 24th day of April, 1942.

ANNA M. SCHOECK
Notary Public of New Jersey
My Commission Expires Sept 15, 1946

Order Assigning Hon. Armistead M. Dobie for Argument.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 8351—October Term, 1942.

UNITED STATES OF AMERICA for the Use and Benefit of CALVIN TOMKINS COMPANY,

Plaintiff-Appellant,

vs.

CLIFFORD F. MACEVOY and THE AETNA CASUALTY AND SURETY COMPANY,

Appellees.

Appeal from the District Court of the United States for the District of New Jersey.

And now, to-wit: this 8th day of July A. D. 1943, it is ordered that Hon. Armistead M. Dobie, United States Circuit Judge for the Fourth Circuit, be and he is hereby assigned to sit in above case in order to make a full court.

JONES,
Circuit Judge.

Endorsements—

Order Assigning Hon. Armistead M. Dobie for Argument
Received & Filed July 8, 1943
WM. P. ROWLAND, Clerk

Decision.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 8351—October Term, 1942.

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,

Appellant,

vs.

CLIFFORD F. MacEVOY and THE AETNA CASUALTY AND SURETY COMPANY,

Appellees.

And afterwards, to wit, the 8th day of July, 1943, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Charles Alvin Jones, Honorable Armistead M. Dobie and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 13th day of August, 1943, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

Decision.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 8351—October Term, 1942.

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,

Appellant;

vs.

CLIFFORD F. MACEVOY and THE AETNA CASUALTY AND SURETY COMPANY,

Appellees.

APPEAL FROM AN ORDER AND DECREE OF UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

OPINION.

(Filed August 13, 1943)

Before JONES, DOBIE and GOODRICH, *Circuit Judges.*

DOBIE, *Circuit Judge*:

This is an action on a payment bond given pursuant to the Miller Act, 49 Stat. 793, 40 U.S.C.A. §270a, brought by the use-plaintiff, The Calvin Tomkins Company, hereinafter called plaintiff, in the United States District Court for the District of New Jersey, against the Clifford F. MacEvoy Company, hereinafter called defendant, and The Aetna Casualty and Surety Company, hereinafter called surety.

On June 3, 1941, the defendant entered into a contract with the United States of America, in which the defend-

ant agreed to furnish the materials and perform the work necessary for the construction of a defense housing project near Linden, New Jersey. Pursuant to the Miller Act, defendant and surety executed a bond on United States Form No. 25-A, in the sum of one million dollars, conditioned on the prompt payment of the claims of all persons supplying labor and material in the prosecution of the work specified in defendant's contract.

Defendant thereafter contracted with the James H. Miller Company, hereinafter called Miller Company, for the furnishing of wall-board building materials by it to defendant for use in the housing project. Miller Company then in turn contracted with plaintiff, which, with the knowledge, consent and approval of defendant, furnished $47,119.14 worth of building materials through Miller Company to be used by defendant on the project.

Plaintiff, which had not been paid in full by Miller Company for the goods supplied, instituted the present action against defendant and surety on the bond in order to recover the unpaid balance of $12,033.49 due it. The trial court dismissed plaintiff's complaint on the ground that it failed to state a valid cause of action. Plaintiff has duly appealed to this Court. The cardinal question presented for our consideration is whether the Miller Act subjects a government contractor (defendant) and his surety to liability under a payment bond, to a third person (plaintiff) who has furnished material to a materialman (Miller Company), in the absence of any contractual relationship between this third person (plaintiff) and any subcontractor, when the term "sub-contractor" is used in a narrow, technical sense to distinguish this term from the term "materialman".

Apparently, the question is one of first impression since our independent research and that of both counsel have failed to unearth any similar situations passed upon by either the Supreme Court or any Circuit Court of Appeals. Accordingly, we shall scrutinize with great care the

exact terminology and legislative history of the Miller Act. We shall also examine and apply the relevant decisions under the Heard Act which antedated, and has been repealed by, the Miller Act.

At the threshold, we notice that no mention is made of contractors or subcontractors in the title of the Miller Act. A statement is merely made to the effect that the bond is "for the protection of persons furnishing material and labor for the construction, alteration or repair of said public building or public work."

The first section of the Act then goes on to provide that the bond is "for the protection of *all* persons supplying labor and material in the prosecution of the work provided for in said contract for the use of *each* such person." (Italics ours.) Section two continues, in part, "*Every* person who has furnished labor or material in the prosecution of the work provided for in such contract * * * *shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid* * * * *or sums justly due him.*" (Italics ours.)

Section three then stipulates that *any* person who has supplied labor or material for such work and who has not been paid may, upon making an affidavit to that effect, obtain a certified copy of the bond of the contractor and the contract for which the bond was given. Section four merely defines certain terms in the Act and the last section provides for the repeal of the Heard Act.

Thus, the only limitation placed upon admission to the class of persons who may recover on the contractor's bond in the Act itself is that they must have "furnished labor or material in the prosecution of the work." Surely plaintiff's credentials as presented in its complaint entitle it to the protection of the Act within a literal reading of the statute.

Moreover, the condition of the very bond in question which was furnished by defendant pursuant to the Miller Act states that defendant as "principal shall promptly make payment to *all persons supplying labor and material*

in the prosecution of the work provided for in said contract." (Italics ours.) Thus the only restriction or qualification in the bond itself, as in the Act, is that the person seeking a recovery must have supplied labor or material for the project.

We are unable to rest here, however, for section two of the Miller Act also contains the following language:

> "*Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States Marshal of the district in which the public improvement is situated is authorized by law to serve summons."

The District Court concluded that in the light of this provision, "the plaintiff herein, being a mere materialman who furnished material to another materialman who in turn had a contract with the contractor, does not fall within the benefits afforded by the statute." Consequently, the plaintiff's complaint was dismissed for failure to state a valid cause of action. With all due respect to the court below, we are of the opinion that it has errone

ously construed the statute in so restricting the class of persons who may recover on the contractor's bond.

It is true that this provision relied on by the lower court appears to be in conflict with the remainder of the statute. But that alone is no reason why this single provision should be controlling to the exclusion of (and at the expense of) the other terms of the Act. We think the following statement made by the Supreme Court in reference to the Heard Act is germane at this point:

> "In resolving the ambiguities in its provisions the court must endeavor to give coherence to them in order to accomplish the intention of Congress, and adapt them to fulfill its whole purpose." (*Fleischmann Construction Co.* v. *United States to the use of Forsberg*, 270 U. S. 349, 360 (1926).)

It is our considered opinion that the intention of Congress and the broad purpose of the Miller Act can be carried out only by placing the plaintiff within the cloistered class of those persons who may avail themselves of the benefits of the Act. Our position here is buttressed by the legislative hearings prior to the passage of the Act, as well as by the decisions of the Supreme Court. See Vol. 79 Congressional Record, part 12, page 13,382, Senate proceedings, 74th Congress, 1st Session (H.R. 8519).

The Miller Act, being a substitute for the Heard Act, was intended to be remedial and it must therefore be liberally construed. *Fleisher Engineering Co.* v. *United States*, 311 U. S. 15 (1940). Furthermore, the Supreme Court has already viewed the Miller Act as enlarging the protection given to materialmen and laborers under the earlier Heard Act. See *United States to the use of Noland Co.* v. *Irwin*, 316 U. S. 23 (1942).

In *United States to the use of Hill* v. *American Surety Co.*, 200 U. S. 197 (1906), it was held that pursuant to the Heard Act persons, *without qualification or restriction*,

who furnish labor or material in the construction of a public project, could recover on the contractor's bond where the proper statutory notice was given. The reason assigned for this rule was that "The purpose of the Act was to provide security for the payment of all persons who provide labor or material for public work * * *" and that "the basis of recovery is supplying labor and material for the work." See *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 380 (1917). Moreover, the Court then went on to make the sweeping statement that "In every case which has come before this Court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the Act." *Id.* at 380. See, also, *Standard Accident Insurance Company* v. *United States to the use of Powell*, 302 U. S. 442 (1938); *Fleischmann Construction Company* v. *United States to the use of Forsberg*, 270 U. S. 349 (1926).

It is worthy of note, too, that the Supreme Court denied certiorari in a case decided under the Heard Act which is practically on all fours with the instant case. *Utah Construction Company* v. *United States*, 15 F. (2d) 21, (C.C.A. 9th, 1926), *cert. denied*, 273 U. S. 745 (1926). The Court held in this case that a claimant who, like the plaintiff before us, furnished materials toward the construction of a public project through a person having a contract with a contractor to furnish the materials, might recover on the contractor's bond, regardless of whether the person to whom the materials were furnished by the claimant be considered a materialman or a subcontractor.

It is true that the Heard Act did not contain the particular provision which appears in section two of the Miller Act; but we do not deem this to be an operative fact which would mitigate against our construction of the Miller Act.

We prefer to rest our opinion upon the broader con-

siderations heretofore discussed. A few words, however, under a pure analytic technique, would seem in order concerning the so-called proviso:

> "*Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice * * *."

This provision is not a *proviso* as that term is technically defined—a clause or part of a clause in a statute, the office of which is either to except something from the enacting clause, or to qualify or restrain its generality. Quite obviously, this provision is not an *exception*, which exempts absolutely from the operation of a statute. The provision is essentially an *explanation*—to make clear (what was not clear under the prior Heard Act) that the absence of direct contractual relationship with the general contractor should not defeat actions on the payment bond. Thus, the underlying idea of the provision was to extend (rather than to restrict) the ambit of the Miller Act. The provision came not to destroy but to fulfill; to give more abundant life to the broad sweep of an admittedly beneficient remedial statute.

Accordingly, every effort should be made by us to give to the word "subcontractor", in this setting, a broad, general (rather than its narrow, technical) denotation. Under such an interpretational philosophy, there is little need and less reason for limiting the term to the Tweedledums who perform services and exclude the Tweedledees who supply materials.

The Court below relied heavily on a number of decisions construing state public work statutes. These authorities, of course, are not binding on us in the interpretation of federal legislation, and at best they are deceptive since the purpose, scope and terms of the state enact-

ments are so varied and so different from the act under consideration. Nor do we feel it necessary to indulge in lingual gymnastics by losing ourselves in the labyrinth of divergent decisions which attempt to make a distinction (either practical or theoretical) between a "subcontractor" and a "materialman". We cordially agree with the court below in that an effort to do so would only leave "the searcher after truth in a state of unhappy confusion." *Cf. McNab & Harlin Mfg. Co.* v. *Paterson Building Co.*, 72 N. J. Eq. 929, 67 Atl. 103 (1907), with *Northwest Roads Co., et al.* v. *Clyde Equipment Co.*, 79 F. (2d) 771, (C. C. A. 9th, 1935). Suffice it to say that the Supreme Court itself has used "subcontractor" and "materialman" interchangeably. *Eg., United States Fidelity & Guaranty Co.* v. *United States to the use of Golden Pressed & Fire Brick Co.*, 191 U. S. 416 (1903). Inasmuch as there is no uniform rule on the subject, we are satisfied that Congress used the word "subcontractor" in its broad, generic sense so as to include persons who have a contract to furnish building materials to a materialman. By so doing, instead of torturing the meaning of the disputed provision in section two of the Miller Act, we attempt to bring it into harmony with both the Congressional intent and the express wording of the remainder of the statute. *Cf. United States to the use of Alexander Bryant Co.* v. *New York Steam Fitting Co.*, 235 U. S. 327 (1914); *Vermont Marble Co.* v. *National Surety Co.*, 213 Fed. 429 (C. C. A. 3d, 1914).

Accordingly, for the reasons assigned, the judgment of the lower court is reversed.

Reversed.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

Order Reversing Judgment.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 8351—October Term, 1942.

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,

Appellant,

vs.

CLIFFORD F. MACEVOY and THE AETNA CASUALTY AND SURETY COMPANY,

Appellees.

Before JONES, DOBIE and GOODRICH, *Circuit Judges.*

On appeal from the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs.

By the Court,

August 13, 1943.

JONES,
Circuit Judge.

Endorsements—

Order Reversing Judgment, etc.
Received & Filed Aug. 13, 1943
WM. P. ROWLAND, Clerk

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

Docket No. 8351.

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,

Appellant,

vs.

CLIFFORD F. MACEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,

Appellees.

Petition for Rehearing.

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

Clifford F. MacEvoy Company and The Aetna Casualty and Surety Company, the appellees herein, respectfully petition this Court for a rehearing of the appeal heard by this Court on July 8, 1943, and decided on August 13, 1943, on the grounds hereinafter set forth.

STATEMENT OF THE FACTS AND THE ISSUE.

This is an action by the "use plaintiff", Calvin Tomkins Company, hereinafter called the plaintiff, upon a payment bond furnished by defendant Clifford F. MacEvoy Company, as principal, and defendant The Aetna Casualty and Surety Company, as surety, under the Miller Act,

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AUG 27

49 Stat. at L. 793, 794, 40 U. S. C. A. 270a, 270b, in connection with a construction contract between defendant MacEvoy Company and the United States of America.

The substance of plaintiff's complaint is that the defendant MacEvoy Company purchased from James H. Miller & Company certain building materials for such project, that such materials were obtained by Miller & Company from the plaintiff and that Miller & Company has failed to pay the plaintiff for some of said materials.

The defendants, before answer, moved for an order dismissing the action on the ground that plaintiff failed to state a claim against defendants on which relief could be granted. An order and decree dismissing the complaint, with costs, was made and entered by the District Court on April 5, 1943, and plaintiff appealed therefrom to this Court; said appeal being argued on July 8, 1943 and decided on August 13th, 1943.

The sole issues involved were whether the Miller Act subjects a Government contractor and his surety to liability, under the payment bond, to a third person who has furnished material to a materialman dealing with the contractor in the absence of any contractual relationship between said third person and any subcontractor, and whether the word "subcontractor", as used in Section 2(a) of the Miller Act, includes a mere materialman.

Decision.

This Court, in its opinion filed August 13th, 1943, held that plaintiff was entitled to sue upon the payment bond and reversed the judgment of the lower court.

Grounds for Rehearing.

I. *This Court Has Failed to Give Proper Effect to the Proceedings in Congress, and to the Committee Hearings and Reports in Connection With the Adoption of the Miller Act in Order to Ascertain the True Intent of Congress.*

Petitioners feel that, due to the number of arguments presented to this Court by both sides, the Court has not fully appreciated or considered the history and circumstances surrounding the enactment of this legislation, and that a more detailed analysis and review of the same might result in a decision affirming the District Court.

The Court, in its opinion, at page 5, makes only one reference to the legislative history as follows:

> "Our position here is buttressed by the legislative hearings prior to the passage of the Act, as well as by the decisions of the Supreme Court. See Vol. 79 Congressional Record, part 12, page 13, 382. Senate Proceedings, 74th Congress, 1st Session (H. R. 8519)."

This reference is undoubtedly the same reference made in the appellant's brief quoting Senator Burke at the time of introducing the Senate Committee Report. An examination of the legislative history, however, shows that the Senate held no hearings (see Senator Burke's own statement to this effect on the same page of the Congressional Record), all of the work having been done by the House Committee, the Senate adopted the House report, and both the Senate and the House reports completely negatived the generality of Senator Burke's statement which was not made in response to any question affecting the issue here involved. In any event, as we shall hereafter show, the report which Senator Burke presented is controlling on him as well as upon the courts

and that report is entirely inconsistent with the decision which has been reached by this Court.

The Miller Act, in the form in which it was finally enacted, was first presented to the House of Representatives by Rep. Miller as H. R. 8519 (Congressional Record, 74th Congress, 1st Sess., Vol. 79, part 9, p. 9410), and referred, without discussion, to the Committee on the Judiciary. At least eight other bills dealing with the same subject matter were introduced and referred to that committee. Hearings were held on all these bills by the Subcommittee of the Committee on the Judiciary, of which Mr. Miller acted as Chairman (see Hearings before the Committee on the Judiciary, House of Rep., 74th Congress, 1st Sess., U. S. Gov't. Printing Off. Doc. #143338). These various bills differed substantially on the question of protection to persons not dealing directly with the contractor, and some of them contained clauses which would clearly extend the protection of the payment bond to the most remote furnishers of labor or materials. None of these bills was reported out of Committee, except H. R. 8519 which was enacted by both the House and Senate, without amendment.

No debate was had in either the House or the Senate, the bill being passed upon the report of the Committees (House Report No. 1263; Senate Report No. 1238). The final proceedings in the Senate show that the Senate Judiciary Committee held no hearings on this bill, but acted upon and adopted in full the House Committee report which was based upon the most extensive hearings. (Cf. House Proceedings, Cong. Rec., Vol. 79, Part 11, p. 11702; Senate Proceedings, Cong. Rec., Vol. 79, Part 12, p. 13382.)

With this background, therefore, it is obvious that the true intent of the legislative body, and the meaning of the proviso contained in Section 2(a) of the Act, can be determined only after the most careful analysis of the House Committee hearings and report. We believe

that such analysis conclusively demonstrates that Congress intended to restrict protection of the bond to exclude persons having no contractual relationship with either the principal contractor or a subcontractor, and this is the only construction which can give effect to the statute, or meaning to the Committee Report or the proceedings upon which it was based.

It is well established by decisions of the Supreme Court that the meaning of doubtful or ambiguous statutes may be shown by reference to Committee reports or statements of the member having the bill in charge, and that contrary statements made in debate in Congress are of very little weight to contradict expressions of intent found in the Committee reports. In *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 86 L. Ed. 726 (1942), Chief Justice Stone said at page 124 *et seq.*:

> "In adopting the change in the new bill, giving to the Secretary the authority to regulate the handling of products 'directly affecting' interstate commerce, and in deleting the phrase 'in competition with' interstate commerce, the House and Senate Committees on Agriculture, after referring to the *A. L. A. Schechter Poultry Corp.* case, stated: 'This phrase has been omitted from the proposed §8c(1) of the bill which deals with orders * * * because the proposed language makes it clear that the full extent of the Federal power over interstate and foreign commerce and no more is intended to be vested in the Secretary of Agriculture in connection with orders.' See S. Rep. No. 1011, p. 9; H. Rep. No. 1241, p. 8, 74th Cong. 1st Sess.
>
> "The same interpretation of the amendments was given by the Committee representative charged with explaining them on the floor of the Senate, who declared, 79 Cong. Rec. 11,139, 'The position of the

Committee in respect to these amendments is that intrastate commerce may burden or affect interstate commerce and that consequently this is a constitutional enactment under the decision of the Court in the *Shreveport* Case.' The House debates also disclose general recognition that the bill as amended was intended to be a full exercise of the federal power over competing intrastate milk. 79 Cong. Rec. 9479-9480, 9485.

"The opinions of some members of the Senate, conflicting with the explicit statements of the meaning of the statutory language made by the Committee reports and members of the Committees on the floor of the Senate and the House, are not to be taken as persuasive of the Congressional purpose. Cf. *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290, 318, 41 L. Ed. 1007, 1019, 17 S. Ct. 540. Moreover, other Senators, not members of the Committee on Agriculture, accepted its view of the extent to which the federal power was to be exerted by the proposed legislation."

See also:

Lapina v. *Williams*, 232 U. S. 78, 89;
Duplex Printing Press Co. v. *Deering, et al.*, 254 U. S. 443, 475;
McLean v. *United States*, 226 U. S. 374, 380;
Northern Pacific Railway Co. v. *State of Washington*, 222 U. S. 370, 380;
Oceanic Steam Navigation Co. v. *Stranahan*, 214 U. S. 320, 333.

(N. B. For a recent example of the comprehensive reference to Committee reports and reliance thereon by the United States Supreme Court, see *Boone* v. *Lightner*, 87 L. Ed. 1099, decided June 7, 1943.)

As has been stated above, the Act is identical with H. R. 8519 which was introduced by Representative Miller. However, prior to the introduction of H. R. 8519, Representative Miller had introduced H. R. 6677. That earlier bill, which is set forth in full in the Committee hearings, was substantially (with certain minor variations) the same as his later bill 8519, with the notable exception that Section 2(a), which is here in issue, was so worded in the earlier bill as to require only the requisite notice from persons having no contractual relationship with the contractor to permit them to sue upon the bond. Under that bill it is clear that the plaintiff herein would be entitled to the protection of the bond. However, in the later bill introduced by Representative Miller, and which was finally enacted, Section 2(a) was radically changed by making direct contractual relationship with a subcontractor a prerequisite for suit in any case where no contractual relationship existed between the claimant and the contractor.

The earlier bill, H. R. 6677, was never reported out of Committee. H. R. 8519, which was substituted for it, was favorably reported after considerable discussion, both pro and con, in the public hearings as to the advisability or inadvisability of affording protection to remote claimants. A copy of Section 2(a) of H. R. 6677 and a copy of Section 2(a) of H. R. 8519 (now the Miller Act) are annexed hereto as exhibits.

It is thus apparent that Congress, after the most complete consideration by its Judiciary Committee, has rejected legislation which would extend protection of the bond to claimants as remote as this appellant and has enacted legislation containing specific limitations.

As has been previously pointed out to this Court, the House Committee's Report (Report No. 1263) and the

Senate Committee's Report (Report No. 1238), both of which are identical, contain the following language:

> "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor but that is as far as the bill goes. *It is not felt that more remote relationships ought to come within the purview of the bond.*" (Italics ours.)

We have, therefore, a situation where Congress rejected a bill which would have given plaintiff the protection it claims and passed a bill which contains, to say the least, definite language of limitation. The proviso in Section 2(a) is the only language of limitation to which the above quoted paragraph from the Committee Reports could have reference. Even granting that the statement in the Committee Reports is not couched in the most accurate, technical, legal language, it definitely indicates that the Committee meant the proviso in Section 2(a) to be a limitation, and that the House and the Senate, in passing the bill without debate and upon the basis of their Committees' Reports, must have intended to carry such limitation into effect. As was said by Judge Cardozo in *103 Park Avenue Co. v. Exchange Buffet Corp.*, 242 N. Y. 366, 374, the duty of the Court "is to search out the intention of the Legislature and to give effect to it when discovered though the expression be imperfect".

II: *The Importance of and Public Interest in the Issues Determined, Warrants Reconsideration by this Court.*

While not wishing in this petition to renew matters which may be presumed to have received the full consideration of this Court, we do wish to point out the following considerations affording additional reason for rehearing, namely:

(a) The unusual importance of the question involved,

not only to public contractors, surety companies and the building trades, but to the Government itself, in so far as the decision will undoubtedly result in a substantial increase in bond premiums and corresponding increased cost to the Government in carrying out public works.

(b) The fact that, although this is remedial legislation which is ordinarily liberally construed, the issue involves the determination of the persons protected by such legislation and, therefore, the rule of strict construction must be applied. To a large extent this distinction is the answer to the liberal pronouncements made by the Supreme Court in dealing both with this statute, and its predecessor, the Heard Act, since in the cases in question the Court was considering procedural problems or the rights of persons who clearly came within the protection of the statute.

(c) The relationships, rights and obligations of respective persons, such as contractors, subcontractors, materialmen and vendors, are the subject of the most technical and exacting treatment in the large body of law affecting the building construction trades, and such relationships and rights under any statute of such wide-spread significance as the Miller Act, should be determined only after the most searching consideration.

Wherefore a rehearing is respectfully prayed.

Dated: August 25, 1943.

Clifford F. MacEvoy Company and The Aetna Casualty and Surety Company,
Appellees.

By Elmer O. Goodwin,
Attorney.

Edward F. Clark,
Of Counsel.

Certificate of Counsel.

I HEREBY CERTIFY that I am of counsel for the appellees, petitioners in the above matter; that the foregoing petition for a rehearing is filed in good faith upon a real and substantial ground and not for mere purposes of delay.

EDWARD F. CLARK,
Of Counsel for Appellees.

Exhibit I.

(EXTRACT FROM H. R. 6677)

2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor or material for which such claim is made was done, performed, furnished, or supplied by him, shall have the right to sue on such payment bond for such amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for such sum or sums as may be justly due him: Provided, however, That any such person who has no contractual relationship, express or implied, with the contractor furnishing said payment bond shall not have a right of action upon the said payment bond unless such person shall have given written notice to said contractor within ninety days after such labor or material has been supplied by such person, stating with substantial accuracy the amount claimed and the name of the party with whom said person contracted. Such notice shall be served in any manner in which the United States marshal of the district in which the contractor does business or resides is authorized by law to serve a summons, save that such service need not be made by the marshal or by mailing said notice by registered mail, postage prepaid, in an envelope addressed to the contractor at his last-known place of business or residence.

Exhibit II.

(EXTRACT FROM H. R. 8519—NOW THE MILLER ACT)

2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

Order Denying Petition for Rehearing.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 8351—October Term, 1942.

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,

Appellant,

vs.

CLIFFORD F. MACEVOY and AETNA CASUALTY AND SURETY COMPANY,

Appellees.

SUR PETITION FOR REHEARING.

AND NOW, to wit, September 20, 1943, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia,

JOHN BIGGS, JR.,
Circuit Judge.

Endorsements—

Order Denying Petition for Rehearing
Received & Filed Sept. 20, 1943
WM. P. ROWLAND, Clerk

Clerk's Certificate.

United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit—*Set.*

I, WM. P. ROWLAND, Clerk of the United States Circuit Court of Appeals for the Third Circuit, DO HEREBY CERTIFY that the foregoing to be a true and faithful copy of the original Appendices to the Briefs of Appellant and Appellees, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of United States of America, for use and benefit of Calvin Tomkins Co., Appellant, v. Clifford F. MacEvoy and Aetna Casualty and Surety Company, Appellees, No. 8351, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 12th day of October in the year of our Lord one thousand nine hundred and forty-three, and of the Independence of the United States the one hundred and sixty-eighth.

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of
Appeals, Third Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 13, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary docket. The Solicitor General is invited to file a brief as amicus curiae if he is *do* advised.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.